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LEGAL MEMORANDUM

TO: Senate Committee on Ethics

FROM: Office of Legislative Legal Services

DATE: June 25, 2021

SUBJECT: Open Meetings and Open Records in Ethics Investigations¹

Legal Question

Following receipt of a complaint about Senator Gardner pursuant to Senate Rule 43, the President of the Senate and the Senate Minority Leader appointed five members to a Senate Committee on Ethics (Committee) pursuant to Senate Rule 43. The Committee is tasked with making a preliminary investigation of the complaint and if, after the preliminary investigation, the Committee determines that probable cause exists to find that a violation may have occurred and if Senator Gardner then requests a hearing, holding an evidentiary hearing on the matter. Do the Open Meetings Law, part 4 of article 6 of title 24, C.R.S., and the "Colorado Open Records Act" (CORA), part 2 of article 72 of title 24, C.R.S., apply to the Committee's actions?

¹ This legal memorandum was prepared by the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

Short Answer

Yes. Pursuant to Senate Rule 43 (e), both the Open Meetings Law and CORA apply to the Committee's actions. Under the Open Meetings Law, the Committee's meetings are public and the Committee may meet in executive session only under certain circumstances, including receiving legal advice from attorneys representing the Committee on specific legal questions. Generally, a document relating to the Committee is a public record unless the document meets one of the exceptions set forth in CORA.

Discussion

The Senate President received a complaint under Senate Rule 43 alleging that: (1) Senator Gardner exerted undue influence on the State Court Administrator for private gain by calling the State Court Administrator to get a different judge appointed to a colleague's court case; (2) Senator Gardner had a conflict of interest when he sponsored House Bill 21-1136² while he was also serving on a committee tasked with hiring an investigator to investigate the judicial branch; and (3) Senator Gardner's sponsorship of House Bill 21-1136 undermined public confidence in the integrity and independence of the Senate. The Committee was formed under Senate Rule 43 in response to the complaint.

Senate Rule 43 (e) provides:

(e) All proceedings of the committee shall be governed by the provisions of part 4 of article 6 and part 2 of article 72 of title 24, Colorado Revised Statutes.

Part 4 of article 6 of title 24, C.R.S., is the Open Meetings Law and part 2 of article 72 of title 24, C.R.S., is CORA. Therefore, pursuant to Senate Rule 43 (e), the Committee's proceedings are subject to the Open Meetings Law and CORA.

1. The Committee's proceedings are subject to Open Meetings Law.

Section 24-6-402 (2)(a), C.R.S., provides that "[a]ll meetings of two or more members of any state public body at which any public business is discussed or at which any

² House Bill 21-1136 is entitled "Concerning modifications to the policies governing judicial division retirees returning to temporary judicial duties, and, in connection therewith, making an appropriation." House Bill 21-1136 became effective on May 4, 2021.

formal action may be taken are declared to be public meetings open to the public at all times." Section 24-6-402 (1)(d), C.R.S., defines a "state public body" in a manner that includes any committee of the General Assembly.

Because the Committee is a committee of the General Assembly, it is a state public body. Under section 24-6-402 (2)(a), C.R.S., the Committee's meetings are, therefore, open to the public. Furthermore, under section 24-6-402 (2)(c), C.R.S., if the Committee takes any formal action such as adopting a proposed policy or if a majority or quorum of the Committee is in attendance or expected to be in attendance at a Committee meeting, full and timely notice of the meeting must be provided to the public.

Section 24-6-402 (3), C.R.S., establishes when a state public body may go into executive session, including conferences with an attorney representing the state public body "for purposes of receiving legal advice on specific legal questions." Although pursuant to section 24-6-402 (3)(b)(I), C.R.S., an investigation of charges or complaints against a public official or employee is open to the public unless the public official or employee requests the committee go into an executive session, section 24-6-402 (3)(b)(II), C.R.S., expressly exempts discussions concerning an elected official from subsection (3)(b)(I). It does not appear, therefore, that the Committee's meetings could be closed to the public upon the Senator's request.

Although the Committee may go into executive session if it meets an exception under section 24-6-402 (3), C.R.S., we encourage the Committee to consider carefully whether the circumstances warrant going into executive session when considering an ethics complaint.³

2. Generally, documents related to the Committee are public records subject to CORA.

Pursuant to section 24-72-202 (6)(a)(II), C.R.S., a "public record" includes correspondence of elected officials. "Correspondence" is defined in subsection (1) of that section as any "communication that is sent to or received by one or more specifically identified individuals and that is or can be produced in written form... ."

³ Senate Rule 27 and Rule 31 of the Joint Rules of the Senate and House of Representatives authorize executive sessions, but Senate Rule 27 appears to apply only to meetings of the Senate itself and not a committee of the Senate and Joint Rule 31 applies only to committees of reference.

Under CORA, public records do not include work product prepared for elected officials under section 24-72-202 (6)(b)(II), C.R.S. As relevant to documents related to the Committee, "work product" is defined in section 24-72-202 (6.5) as follows:

24-72-202. Definitions. As used in this part 2, unless the context otherwise requires:

(6.5) (a) "Work product" means and includes all intra- or inter-agency advisory or deliberative materials assembled for the benefit of elected officials, which materials express an opinion or are deliberative in nature and are communicated for the purpose of assisting such elected officials in reaching a decision within the scope of their authority. Such materials include, but are not limited to:

(I) Notes and memoranda that relate to or serve as background information for such decisions;

(II) Preliminary drafts and discussion copies of documents that express a decision by an elected official.

...

(c) "Work product" does not include:

(I) Any final version of a document that expresses a final decision by an elected official;

...

(IV) Any materials that would otherwise constitute work product if such materials are produced and distributed to the members of a public body for their use or consideration in a public meeting or cited and identified in the text of the final version of a document that expresses a decision by an elected official.

(d) (I) In addition, "work product" does not include any final version of a document prepared or assembled for an elected official that consists solely of factual information compiled from public sources. The final version of such a document shall be a public record. [the remainder of the introductory portion to subsection (6.5)(d)(I) has been omitted]

...

Under section 24-72-202 (6.5)(a), C.R.S., documents that staff prepare for the Committee to assist the Committee in reaching its decision would be considered work product and would not be public records; however, if such documents prepared by staff are discussed at an open meeting of the Committee, the documents may become public records under section 24-72-202 (6.5)(d), C.R.S.

Conclusion

Under Senate Rule 43 (e), the Committee's proceedings are subject to the open meeting and notice requirements of the Open Meetings Law and documents related to the Committee are generally subject to CORA.